Supreme Court, U.S.
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Case No. 10-1087

IN THE

Supreme Court of the United States

STEVEN J. THOROGOOD, *et al.*,

Petitioners,

v.

SEARS, ROEBUCK & CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 4, 2011

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QUESTIONS PRESENTED

1. Whether this Court should grant *certiorari* to review the Seventh Circuit's opinion reversing denial of a motion for injunction and remanding for the entry of an injunction, where (a) the injunction Petitioner challenges has not yet been prepared or entered by the district court on remand; and (b) the Seventh Circuit has specifically instructed the district court to take into account, as necessary, this Court's forthcoming decision in *Smith v. Bayer Corp.*?

2. Whether this Court should grant *certiorari* to review a decision where, after ordering decertification of a class pursuing "near-frivolous" claims, the Seventh Circuit properly ordered the district court to enter injunctive relief precluding the lawyers for and members of the decertified class from relitigating the same class certification issues in other courts on the grounds that injunctive relief is necessary to prevent further "abuse of litigation" and to effectuate and prevent the frustration of its prior decertification order?

RULE 29.6
DISCLOSURE STATEMENT

Sears Holdings Corporation owns 100 percent of the stock issued by Respondent Sears, Roebuck & Co.

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INTRODUCTION

The Petition presents no issues worthy of this Court's review. Instead, it poses questions that are at best premature, ignores the salient history of this case – including the Seventh Circuit's repeated findings that this case is a "nuisance suit" and that class counsel's actions amount to "class-action harassment" and "something close to settlement extortion" – and asserts illusory "circuit splits" where none can be found.

First, the Petition seeks to tie itself to a case pending before this Court, *Smith v. Bayer Corp.* (09-1205). Yet it fails to overcome fundamental obstacles frustrating review at this juncture. The Seventh Circuit was fully aware that this Court had granted *certiorari* in *Smith*, and so it structured its ruling in *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010) ("*Thorogood III*") (Pet. App. 1a-30a), accordingly. Recognizing the possibility that some – but not all – features of an injunction could be affected by the outcome in *Smith*, the Court of Appeals remanded to the district court with instructions to craft the injunction, expressly directing the district court to "make clear that persons subject to [the injunction] will be allowed to obtain modification in light of the Supreme Court's decision in the *Smith* case, when it is rendered." (*Id.* at 24a).

The district court has not yet issued the injunction, the wording and scope of which the parties have only recently briefed. If the outcome in *Smith* warrants any changes to any aspects of that injunction, Petitioners will be free to seek it, and the district court's order will in any event be subject to

appeal in due course. Under such circumstances, there is no reason for this Court to grant *certiorari* now, while the critical issues remain in motion, and every reason to allow the lower courts to act. Review at this time is at best premature; the Court should await further development of the record before determining whether any issue that might arise from the injunction warrants scrutiny.

Second, the injunction in this case was a fact-driven response to a remarkable situation of "abuse of litigation." (Pet. App. 20a). In three trips to the Seventh Circuit, the court has been forced to address Petitioners' counsel's mendacity about the underlying law (*id.* at 9a-10a), attempted "settlement extortion" (*id.* at 18a), "extravagant discovery requests" (*id.* at 17a), blatant forum shopping (*id.* at 42a) and premeditated circumvention of the court's class decertification order (*id.* at 9a) – all in asserting a cause of action that the Seventh Circuit has repeatedly described as "implausible," "meager," "almost certainly unreasonable," "near-frivolous," "well-nigh inconceivable" and a "nuisance suit costly to defend against."[1] The Court of Appeals found that these and other abuses not listed here[2] together constituted "class-action harassment" and a "scorched-earth campaign against Sears." (*Id.* at 14a,

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[1] *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 748 (7th Cir. 2008) ("*Thorogood I*"), *cert. denied*, 130 S. Ct. 90 (2009); *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 753, 754 (7th Cir. 2010) ("*Thorogood II*"); (Pet. App. 2a, 5a).

[2] More of the sharp litigation tactics employed by Petitioners' counsel – both against Sears and against the district court and Seventh Circuit – are described in the Court of Appeals' published order denying rehearing of *Thorogood III*. (Pet. App. 36a-48a).

24a). Fortunately, such litigation conduct is not commonplace, and the factual backdrop renders this case a poor vehicle for this Court's review. The Seventh Circuit tailored the injunctive relief to meet these egregious facts.

Third, Petitioners repeatedly assert that "circuit splits" exist regarding the Seventh Circuit's decision to remand for injunctive relief under the All Writs Act. But no such splits exist. After Petitioners' counsel sought to circumvent the class decertification ruling in *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008) ("*Thorogood I*"), *cert. denied*, 130 S. Ct. 90 (2009), by bringing a nearly identical class-action suit in California, one of the jurisdictions expressly subject to *Thorogood I*'s ruling that the proposed class "presents *no* common issues of law or fact" under the laws of any of the jurisdictions at issue, *id.* at 747 (emphasis in original), the Seventh Circuit ordered injunctive relief to effectuate and protect its prior ruling. Such a circumstance presents a textbook case for the exercise of judicial authority under the All Writs Act.

Petitioners nevertheless argue that the injunction is improper because the *Thorogood* class had been decertified, because Petitioner Martin Murray ("Murray") filed the same class claims in California but under purportedly different state law, and because Respondent Sears, Roebuck & Co. ("Sears") did not first seek mandamus from the Ninth Circuit before seeking injunctive relief from the *Thorogood* Court. Not only is there no circuit split as to these dubious propositions of law, but *no* court has ever ruled in the manner that Petitioners allege. Instead, the injunction ordered in *Thorogood III* was

authorized under the All Writs Act, faithful to this Court's precedents and consonant with the rulings of the circuits of the Court of Appeals.

The Petition should be denied.

STATEMENT OF THE CASE

A. Certification and Decertification of the *Thorogood* Class.

In 2006, Petitioner Steven J. Thorogood ("Thorogood") filed a class-action complaint in Illinois state court, alleging that Sears had made misrepresentations about certain Kenmore clothes dryers with "stainless steel" drums, claiming violation of state consumer protection laws, and requesting certification of a nationwide class of consumers who purchased such dryers. *Thorogood I*, 547 F.3d at 743-44. The gravamen of Thorogood's claim was that he had purchased a dryer believing that the words "stainless steel" imprinted on the appliance "meant that the drum was made *entirely* of stainless steel" and also that Sears' marketing and advertising represented the same, but he later found that the drum front contained "at least 11.5 percent chromium" and allegedly rusted and left stains on some of his clothes. *Id.* (emphasis in original). Under the Class Action Fairness Act, 28 U.S.C. § 1332(d), Sears removed to the United States District Court for the Northern District of Illinois.

Pursuant to Fed. R. Civ. P. 23, the district court certified a class of consumers from 29 jurisdictions – including California – who purchased any of 50 different models of Kenmore dryers in the previous five years. *Thorogood v. Sears, Roebuck & Co.*, No. 06-C-1999, 2007 U.S. Dist. LEXIS 81035, at *9-10

(N.D. Ill. Nov. 1, 2007). In doing so, the district court found, upon the averment of Petitioners' counsel, that the legal standard applied in the 29 jurisdictions, including California, was substantially identical. *Id.* at *6-7. The district court further expressly found that the proposed class was adequately represented by class counsel. *Id.* at *8 ("[T]he Court finds that [class counsel] have been diligent in presenting the case and they have adequate experience to handle cases of this sort.").

The Seventh Circuit granted Sears' subsequent petition for interlocutory appeal under Rule 23(f). The Seventh Circuit reversed, finding that "there are *no* common issues of law or fact, so there would be no economies from class action treatment." *Thorogood I*, 547 F.3d at 747 (emphasis in original). Judge Posner, writing for a unanimous panel, called the case "a notably weak candidate for class treatment," *id.* at 746, stated that Thorogood's concerns were "idiosyncratic," *id.* at 747, and explained that:

> the proposition that the other half million buyers [in the class], apart from Thorogood, shared his understanding of Sears's representations and paid a premium to avoid rust stains is, to put it mildly, implausible, and so would require individual hearings to verify.

Id. at 748. In the words of the court: "Do the other 500,000 members of the class believe this? Does *anyone* believe this besides Mr. Thorogood?" *Id.* at 747 (emphasis in original).

Noting that in this case, "[a]part from the usual negatives [inherent in class actions], there are no positives," *id.* at 746, the Seventh Circuit captured

the essence of the problem as follows: "The deal breaker is the absence of any reason to believe that there is a single understanding of the significance of labeling or advertising clothes dryers as containing a 'stainless steel drum.'" *Id.* at 748.

Thorogood filed a petition for rehearing and rehearing *en banc*, which the Court of Appeals denied, and he then sought *certiorari* from this Court, which was also denied. *Thorogood v. Sears, Roebuck & Co.*, 130 S. Ct. 90 (2009).

B. Dismissal of Thorogood's Individual Claim.

Following decertification, Petitioners' counsel refused to accept Sears' offer of settlement of Thorogood's individual claim under Fed. R. Civ. P. 68, telling the district court that "he wanted a judgment in his client's individual case, for however little money, not only as a premise for an award of attorneys' fees but also so that he could use it as 'offensive' res judicata in other cases (that is, to preclude Sears's defending similar cases on the merits)." (Pet. App. 9a).

Sears then moved for dismissal, which the district court granted. In doing so, the court noted that the attorneys' fee request made by Petitioners' counsel – which sought "more than eighty-two times the $3,000 maximum damages recovery" – was "so disproportionate and unreasonable that it could not be salvaged." *Thorogood v. Sears, Roebuck & Co.*, Case No. 06-C-1999 (N.D. Ill.), Minute Entry of July 15, 2009 (ECF No. 142).

The Seventh Circuit affirmed, in another unanimous ruling. The court reiterated its earlier

"resounding[]" rejection of class treatment and described the underlying claim as a "nuisance suit costly to defend against." *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 753, 754 (7th Cir. 2010) ("*Thorogood II*"). As to the attorneys' fee request of Petitioners' counsel, the court observed that Thorogood's individual claim was "noticeably weak, his understanding of Sears's 'stainless steel' representation being almost certainly unreasonable." *Id.* at 753. Accordingly, the court ruled that "[t]he plaintiff's effort to exalt his meager claim into a sprawling nationwide class action was a flop. Sears should not have to bear the entire cost of the flop." *Id.* Thorogood again unsuccessfully sought rehearing.

C. Petitioners' Counsel Files the *Murray* Action in California.

While the *Thorogood II* appeal was still pending, in November 2009, Petitioners' counsel filed a "virtually identical class action suit" against Sears in California state court on behalf of Murray, asserting claims akin to those raised in *Thorogood*, "alleging 'a similar set of operative facts as alleged in the *Thorogood* case,'" and seeking certification of a class of California consumers who had purchased the same Kenmore dryers at issue in *Thorogood*. (Pet. App. 2a, 11a). Sears removed the *Murray* case to the United States District Court for the Northern District of California. *Murray v. Sears, Roebuck & Co.*, Case No. C-09-5744-CW (N.D. Cal.), Notice of Removal (ECF No. 1).

Shortly thereafter, Petitioners' counsel began "issu[ing] bulky discovery requests" to Sears, (Pet. App. 11a), thus far in the form of 65 separate requests for production and 20 interrogatories to

Sears, including depositions of corporate representatives on more than 80 categories of information and over 115 types of documents.

D. Sears Seeks Injunctive Relief in *Thorogood* and Preclusion in *Murray*.

In March 2010, Sears filed a motion with the district court in *Thorogood*, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), requesting that the members of the decertified class and their lawyers be permanently enjoined from seeking to certify a class elsewhere under Rule 23 based on the same allegations made in *Thorogood*. Shortly thereafter, based upon the belief that collateral estoppel was available to Sears in the *Murray* case (Pet. App. 35a), the district court denied Sears' motion, prompting appeal to the Seventh Circuit. (*Id.* at 2a).

Following denial of its motion for injunction but while its appeal to the Seventh Circuit was pending, Murray sought to "drown[Sears] in the discovery bog." (*Id.* at 18a). Sears moved the *Murray* court to stay the matter pending final resolution of the injunction in *Thorogood* or, alternatively, to strike Murray's class-action allegations on the grounds that class certification was precluded by the collateral estoppel effect of *Thorogood I*.

The *Murray* court initially granted Sears' motion and struck Murray's class-action allegations, *see Murray v. Sears, Roebuck & Co.*, No. 09-05744CW, 2010 U.S. Dist. LEXIS 83284 (N.D. Cal. July 21, 2010), but, after permitting amendment of the complaint, the court then denied Sears' subsequent motion to strike based on collateral estoppel and ordered discovery to proceed, *see Murray v. Sears,*

Roebuck & Co., No. 09-05744CW, 2010 U.S. Dist. LEXIS 97811 (N.D. Cal. Sept. 3, 2010).

Following denial of Sears' motion, Mark Boling, Murray's local counsel, sent an e-mail to Sears' counsel, threatening Sears with massive discovery and warning of the consequences of failing to come to terms – a communication which the Seventh Circuit later described as "something close to settlement extortion." (Pet. App. 12a; *see also id.* at 26a-30a (Boling e-mail)).

E. The Court of Appeals Orders Injunctive Relief.

In November 2010, in its third unanimous ruling, the Seventh Circuit reversed the district court and ordered it to enjoin the members and lawyers of the *Thorogood* class. (*Id.* at 20a-25a).

The court reiterated the fundamental unsuitability of the class, echoing its earlier judgment that there were "*no* common issues of law or fact," stating that Thorogood's purported concerns regarding Sears' dryers were a "confabulation," and observing that it was "well-nigh inconceivable that the other members of the class had the same understanding of Sears's advertising as Thorogood claimed to have." (*Id.* at 5a, 6a (emphasis in original)). The court also briefly reflected on the argument by Petitioners' counsel for attorneys fees, which it called "beyond weak," particularly since it had been grounded on a "threadbare, idiosyncratic claim." (*Id.* at 8a). And the court took note of the sharp about-face by Petitioners' counsel, who once claimed that the relevant laws of the 29 jurisdictions in *Thorogood* were substantially similar but now claimed otherwise. (*Id.* at 9a-10a).

The Seventh Circuit observed that, "[o]rdinarily the ability to plead res judicata or collateral estoppel gives a litigant adequate protection against being harassed by repetitive litigation by the loser in a previous suit against him," which would weigh against the granting of injunctive relief. (*Id.* at 12a). But the court found otherwise in this circumstance: "this case is unusual both because it involves class action litigation and because of the specific tactics employed by class counsel, which include, as we'll see, something close to settlement extortion." (*Id.*).

The court then ruled that the *Murray* action had been precluded by *Thorogood I*. (*Id.* at 18a-20a). The court also found that the effort by Petitioners' counsel to "drown" Sears "in the discovery bog" in *Murray* constituted significant, irreparable harm, (*Id.* at 18a), and it expressed concern that, absent injunctive relief, Petitioners' counsel could "fil[e] carbon-copy class actions against Sears in other states as well." (*Id.* at 16a-17a). On these bases, the Seventh Circuit found that Sears had no adequate remedy at law and that, under the authority of the All Writs Act, it was "entitled to an injunction." (*Id.* at 20a).

The court then carefully instructed the district court as to the necessary considerations for fashioning the injunction. (*Id.* at 20a-25a). In particular, the court took specific notice of the *Smith v. Bayer Corp.* (Case No. 09-1205) matter pending before this Court, directing the district court to "make clear that persons subject to [the injunction] will be allowed to obtain modification in light of the Supreme Court's decision in the *Smith* case, when it is rendered." (*Id.* at 24a).

With the pending *Smith* case in mind, the court further explained that it could not condone "class-action harassment" in this case:

> Class counsel had and took the opportunity to litigate the certification issue fully -- so that to say that a ruling against certification could not be the basis of an injunction would be inconsistent with the doctrine of collateral estoppel itself. There is no denying that a final ruling against certification has collateral estoppel effect. And the basis of the injunction sought in this case is simply the need for enforcing collateral estoppel more effectively than by forcing the defendant to plead it as a defense in case after case.

(*Id.* at 25a).

Petitioners' counsel sought rehearing, and the Seventh Circuit responded in the form of a rare, published opinion. *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir. 2010) (Pet. App. 36a-48a). In denying rehearing, the court stated:

> Neither the judges on this panel nor other federal judges so far as we are aware have denied that the class action is a worthwhile device, and indeed is indispensible for the litigation of many meritorious claims. But like many other good things it is subject to abuse. It has been abused in the stainless steel clothes dryer litigation.

(Pet. App. 47a-48a).

In the months since *Thorogood III* was issued, the district court has taken up formulation of the injunction and received briefing from the parties. At the time of filing this Opposition, the parties have submitted competing proposed injunctions and have briefed the issues for the district court. No injunction has yet been issued by the district court.

REASONS FOR DENYING THE PETITION

I. Any Review of this Interlocutory Order Is Premature at Best.

1. The Petition seeks to brush fundamental problems with this Court's review under the rug, hoping to convince the Court to grant *certiorari* in light of *Smith* or at a minimum, to grant, vacate and remand. Yet consideration of any impact of this Court's upcoming decision in *Smith v. Bayer Corp.* has already been entrusted to the district court. This Court should not accept review of interlocutory decisions such as this, particularly when the Court of Appeals gave explicit direction to the district court to evaluate the impact, if any, of *Smith*.

In ordering injunctive relief, the Seventh Circuit expressly directed the district court to draft the injunction order to "make clear that persons subject to [the injunction] will be allowed to obtain modification in light of the Supreme Court's decision in the *Smith* case, when it is rendered." (Pet. App. 24a). Thus, when *Smith* is issued, the parties will be able to seek guidance first from the district court and then (if necessary) from the Court of Appeals as to whether, or to what degree, any modification of the anticipated injunction is in order.

At the time of any appeal, the record will be better developed, and lower courts will have had a chance to apply and interpret *Smith*. The Court can then decide whether the issues presented by the injunction warrant *certiorari*.

This type of situation is the quintessential one where this Court disfavors review of interlocutory orders. It is the longstanding policy of this Court to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring), *citing Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); *see also Am. Constr.*, 148 U.S. at 384 (stating that this Court does not "review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case"). Thus, lack of finality in a judgment may "of itself alone" furnish "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("[T]his Court above all others must limit its review of interlocutory orders.").

By way of example, in *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 327-28 (1967) (*per curiam*), this Court confronted a circumstance where a district court had issued a temporary restraining order forbidding a strike and the Court of Appeals subsequently ruled, answering several legal questions but remanding to the district court for consideration of related matters and further adjudication. Denying *certiorari*, this Court

explained: "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328. The same is true here.

The district court is in the midst of fashioning an injunction pursuant to *Thorogood III*. It should be allowed to complete its task consistent with the Seventh Circuit's instructions.

2. Regardless of the care taken by the Seventh Circuit in appreciation of *Smith*, significant differences between that case and this one suggest a minimal potential impact of *Smith*. Pinning their hopes to *Smith* thus does not advance Petitioners' goal.

The posture of *Thorogood III* is different from that of *Smith* and provides weaker justification for *certiorari*. In *Smith*, the district court denied class certification in the context of multidistrict litigation ("MDL") which included a representative class plaintiff for West Virginia. After denial of certification, other plaintiffs sought to certify a similar class in West Virginia state court. Bayer then successfully sought an injunction from the MDL court, which the Eighth Circuit affirmed. *In re Baycol Prods. Litig.*, 595 F.3d 716, 719 (8th Cir. 2010), *cert. granted sub nom. Smith v. Bayer Corp.*, 131 S. Ct. 61 (2010).

The underlying class in *Smith* was never certified, *see id.*, whereas, here, "the class (Thorogood's) *was* certified, albeit later decertified at [the Seventh Circuit's] direction." (Pet. App. 24a-25a (emphasis in original)). And as to the Seventh Circuit's original decision to decertify the class in *Thorogood I*, this

Court has already denied *certiorari*. *Thorogood v. Sears, Roebuck & Co.*, 130 S. Ct. 90 (2009).

Moreover, by the time the *Smith* plaintiffs sought *certiorari*, an injunction had already issued, the Eighth Circuit had ruled, and the issue was ripe for review.[3] Not so here. In *Thorogood*, the Seventh Circuit ordered an injunction, but the district court has not yet issued one. This Court thus has the complete record in *Smith* that is wanting here. Therefore, unlike this case, *Smith*'s posture presented an appropriate vehicle for review.

II. Because this Matter Presents an Unusual and Sustained Case of Litigation Abuse, It Does Not Provide a Vehicle Appropriate or Tailored for this Court's Review.

The Petition attempts to cast the underlying litigation as involving an ordinary, would-be class action. As the record conclusively demonstrates, however, it is anything but. Indeed, from beginning to end, this case has constituted a "scorched-earth campaign against Sears" in the form of "class-action harassment," (Pet. App. 14a, 24a), and the Seventh Circuit ordered injunctive relief in response to that unique set of circumstances. Accordingly, the Petition does not provide an appropriate vehicle for this Court's review.

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[3] The same is true of two other cases that Petitioners rely heavily upon: *In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998) (affirming denial of injunction), and *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233 (11th Cir. 2006) (reversing injunction).

With the benefit of now having adjudicated three appeals from the *Thorogood* matter, the Court of Appeals has repeatedly found the class claims pursued by Petitioners' counsel to be "implausible," "not (quite) frivolous," and "near-frivolous." *Thorogood I*, 547 F.3d at 748; *Thorogood II*, 595 F.3d at 752; (Pet. App. 2a). Indeed, the court found that Thorogood's *individual* claim was "idiosyncratic," "meager," and, "judging from the record in his case and the argument of his lawyer, . . . a confabulation." *Thorogood I*, 547 F.3d at 747; *Thorogood II*, 595 F.3d at 753; (Pet. App. 6a).

But even apart from the dubious merits of the underlying claims, the litigation tactics undertaken by Petitioners' counsel definitively set this case apart from other class actions. For one, Petitioners' counsel insisted to the district court and Seventh Circuit that the relevant consumer protection laws in all 29 jurisdictions in *Thorogood* were substantially similar, yet, when that averment became troublesome, he abandoned it altogether and instead later asserted that distinctions in state law were so significant as to defeat the collateral estoppel effects of *Thorogood I*. (Pet. App. 9a-10a).

Then, too, Petitioners' counsel has repeatedly used discovery like a sledgehammer, attempting to bludgeon Sears into settlement. By issuing "bulky discovery" and "extravagant discovery requests" against Sears, the hope of Petitioners' counsel was to use the asymmetrical pressure of class-wide discovery to put "pressure on Sears to settle on terms advantageous to its opponent." (*Id.* at 11a, 15a, 17a). Nowhere was this determination more brazen than in the aftermath of the *Murray* court's incorrect denial

of Sears' motion for collateral estoppel, for it was within days of that event that counsel for the Petitioners threatened even more onerous discovery and urged Sears to give up and accept the "olive branch" offered to it – an effort rightly characterized by the Seventh Circuit as "something close to settlement extortion." (*Id.* at 12a, 29a).

Beyond even this, Petitioners' counsel has cynically accused Sears of "forum shopping" (*Id.* at 42a), when it was Petitioners' counsel who rejected Sears' Rule 68 settlement offer for Thorogood's individual claim for the freely admitted purpose of seeking "an award of attorneys' fees but also so that he could use it as 'offensive' res judicata in other cases (that is, to preclude Sears's defending similar cases on the merits)." (*Id.* at 9a). Following his openly confessed hope to evade *Thorogood I*, at the same time Petitioners' counsel was arguing for attorneys' fees in *Thorogood* "he was already planning to circumvent [the Seventh Circuit's] order decertifying the class by bringing class actions elsewhere." (*Id.*). Unguardedly stating his belief that "'the Ninth Circuit's standards are decidedly more favorable to plaintiffs [sic] claims,'" Petitioners' counsel resurfaced in California – and thus the *Murray* action was born. (*Id.* at 42a).

Taken together, these brazen tactics are why the Seventh Circuit, after observing that in the ordinary case a party generally can obtain adequate relief by pleading a defense of collateral estoppel, found that an injunction here was necessary:

> [T]his case is unusual both because it involves class action litigation and because of the specific tactics employed

> by class counsel, which include, as we'll see, something close to settlement extortion.

(*Id.* at 12a). Indeed, given "the refusal of Thorogood's lawyer . . . to accept defeat," the Seventh Circuit concluded that "[i]f the refusal to enjoin Murray's suit sticks, there is nothing standing in the way of [Petitioners' counsel] Krislov's filing carbon-copy class action against Sears in other states as well." (*Id.* at 4a, 16a-17a). Injunctive relief was necessary precisely because "[t]he harm [Sears] faces from the denial of the injunction is irreparable and its remedy at law against settlement extortion nonexistent." (*Id.* at 18a, 40a).

The circumstances described above and elaborated upon in *Thorogood I*, *II* and *III* – and also in the Seventh Circuit's published decision denying rehearing in *Thorogood III* – set this matter well apart from ordinary class actions. In much the same way that these unusual circumstances and the sharp litigation tactics of Petitioners' counsel left the Court of Appeals with little choice but to order injunctive relief, so too do these same circumstances and tactics render this matter unrepresentative and unsuitable for this Court's review.

III. The Seventh Circuit's Decision Does Not Implicate Any Circuit Split Warranting this Court's Attention.

Petitioners' claim, that the Seventh Circuit occasioned circuit splits by ordering injunctive relief under the All Writs Act (the "Act") in the context of a

class action, does not withstand scrutiny.[4] *Thorogood III* squarely falls within the powers granted to federal courts under the Act, and is consonant with this Court's rulings as well as those of the other circuits.

The Act provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law." 28 U.S.C. § 1651(a). This Court long ago "recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977), *citing Harris v. Nelson*, 394 U.S. 286, 299 (1969) and *Price v. Johnston*, 334 U.S. 266, 282 (1948). Accordingly, courts may properly exercise power under the Act whenever it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it," and not only when it is "'necessary' in the sense that the court could not otherwise physically discharge its . . . duties." *Adams v. United States*, 317 U.S. 269, 273 (1942).

Significantly, the power conferred by the Act extends to "persons who, though not parties to the

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[4] In granting *certiorari* in *Smith*, this Court recognized that a circuit split existed on the estoppel effect of class certification decisions. The Seventh Circuit recognized this as well (Pet. App. 38a-39a), and made express provision for the possibility that the ultimate resolution of *Smith* could affect the injunction that was ordered in *Thorogood III* (*Id.* at 24a, 39a). By contrast, the purported circuit split urged by Petitioners as to the availability of injunctive relief under the All Writs Act against class members seeking to circumvent or frustrate a court's orders, is both distinct and illusory.

original action," are "in a position to frustrate the implementation of a court order or the proper administration of justice." *N.Y. Tel.*, 434 U.S. at 174.

Pursuant to the Act, federal courts have routinely ordered injunctive relief to effectuate or protect their prior rulings. *See, e.g., In re VSM Sec. Litig.*, 103 F.3d 1317, 1324 (7th Cir. 1996) (injunction to protect prior judgments); *In re March*, 988 F.3d 498, 500 (4th Cir. 1993) (same); *Keishian v. Buckley*, 752 F.2d 1513, 1515 (11th Cir. 1984) (same); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983) (same); *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1266-67 (5th Cir. 1969) (same).

A. An Injunction May Properly Be Granted in the Context of a Decertified Class Action.

Petitioners argue that injunctive relief is not available under the Act where a class has been decertified. In an attempt to manufacture a circuit split, Petitioners point to rulings by the Third Circuit in *GM Corp.*, 134 F.3d 133, and the Eleventh Circuit in *Bayshore Ford*, 471 F.3d 1233. Petitioners mischaracterize these cases, which are readily distinguishable and do not conflict with *Thorogood III*.

The power of federal courts under the Act to enjoin proceedings that threaten prior rulings is no less in the context of class actions, for courts "with authority over the original class claim may issue writs under 28 U.S.C. § 1651 in aid of that jurisdiction." *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763, 768 (7th Cir. 2003).

There is no question that the district court had jurisdiction over Thorogood's class claims, or that the Seventh Circuit had jurisdiction to decertify the class in *Thorogood I*. Thus, pursuant to the Act, each of those courts necessarily possessed the jurisdiction "to effectuate and prevent the frustration of" the ruling in *Thorogood I*. *N.Y. Tel.*, 434, U.S. at 172. The cases cited by Petitioners do not suggest otherwise.

In *GM Corp.*, in the context of an MDL proceeding, the Third Circuit had previously reversed the district court's certification of a nationwide settlement class of GM truck owners and remanded for the district court to determine whether the certification problem might be cured. 134 F.3d at 136-37. Instead, parties to the original settlement repaired to Louisiana state court, where a similar suit had been pending, restructured the deal and obtained the state court's approval. *Id.* at 137. Other members of the original putative class then unsuccessfully sought to have the district court enjoin the state court proceeding under the Anti-Injunction Act, 28 U.S.C. § 2283, arguing that the Louisiana plaintiffs were attempting to circumvent the Third Circuit's previous order. *GM Corp.*, 134 F.3d at 145. The Court of Appeals explained that an injunction could not issue precisely because no ruling on class certification had yet been made in federal court and, thus, there was no final judgment to protect from relitigation: "All that we did in *GM I* was hold that the district court had erred in certifying the settlement class without making factual findings to support class certification under Rule 23(a) and (b)(3), and require that certain problems with meeting the Rule 23(a) and (b) requirements be corrected by the MDL court on remand." *Id.* at 146.

GM Corp. is thus distinguishable. The Third Circuit did not, as Petitioners would have it, refuse to issue an injunction because the class had previously been decertified. Rather, injunction was improper because proceedings in the Louisiana court did not threaten or frustrate an existing federal order. In *Thorogood I*, by contrast, the Seventh Circuit conclusively determined that there were "*no* common issues of law or fact, so there would be no economies from class action treatment." 547 F.3d at 747 (emphasis in original). It is this final judgment that Petitioners' counsel has attempted to circumvent and that the Seventh Circuit properly effectuated and protected in *Thorogood III*.

Likewise, *Bayshore Ford* is inapt. In that case, plaintiff auto dealers brought a class action against Ford in federal court in Georgia, but the district court denied certification, finding that the putative class members' claims were mutually antagonistic and that, hence, there was inadequate class representation under Rule 23(a). *Bayshore Ford*, 471 F.3d at 1239-40. A member of the putative class then filed an identical suit in Ohio state court, which certified the same class that the Georgia federal court had rejected. *Id.* at 1236. Westgate Ford, another putative class member, then successfully sought an injunction from the district court. *Id.* The Eleventh Circuit reversed, observing that "the Dealers failed to demonstrate that they would be adequate class representatives, a prerequisite to certification under Rule 23(a)(4). Once this decision was made, Westgate became a stranger to the Bayshore Action." *Id.* at 1245.

There is no conflict between *Bayshore Ford* and *Thorogood III*. In *Bayshore Ford*, no class was ever

certified because the putative class representatives were found inadequate. Adequacy of representation was not a stumbling block for the decertified class in *Thorogood*; both the district court and the Seventh Circuit expressly found that the class had been adequately represented. (Pet. App. 11a); *Thorogood*, 2007 U.S. Dist. LEXIS 81035, at *8. Moreover, adequate representation must be present in order for collateral estoppel even to apply – which, in ordering injunctive relief, the Seventh Circuit expressly found. (Pet. App. 20a ("The judge in California thus was wrong; Murray's suit is barred by collateral estoppel."); *id.* at 11a ("'[I]n a class action . . . a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation. . . . Representative suits with preclusive effect on nonparties [thus] include properly conducted class actions.'" *quoting Taylor v. Sturgell*, 553 U.S. 880, 884, 894 (2008))).

It is clear that, were the Seventh Circuit confronted with the situations in *GM Corp.* and *Bayshore Ford*, it too would have denied injunctive relief in the absence of an underlying federal ruling or inadequate representation, respectively. But those cases are simply not analogous to *Thorogood III*. There is no conflict between the circuits.

B. Variations in State Law Do Not Defeat Preclusion.

Petitioners next argue that the Seventh Circuit erred because putative differences in California law should have prevented collateral estoppel. Although Petitioners attempt to frame this alleged error as a "circuit split," the Seventh Circuit's decision in

Thorogood III neither was error nor is in conflict with the precedent of this Court or that of any circuit.

From the outset, Petitioners mischaracterize the basic facts of the *Thorogood* litigation, wrongly stating that *Thorogood I* involved "reversing Thorogood's multi-jurisdictional class claims *under Tennessee law*." (Pet. at 26 (emphasis added)). No reading of *Thorogood I* will substantiate that allegation. Thorogood's individual claim lay under Tennessee law, but "[t]he members of the class that the plaintiff represents are alleged to have similar claims under similarly worded state consumer protection statutes in their own states" – which together constitute 29 different jurisdictions, including California, where Murray later filed his copy-cat suit. *Thorogood I*, 547 F.3d at 744.

Moreover, the Seventh Circuit decertified the class not for any oddity of Tennessee law but because:

> not only do common issues of law or fact not predominate over the issues particular to each purchase and purchaser of a 'stainless steel' dryer, as Rule 23(b)(3) of the Federal Rules of Civil Procedure requires, but there are *no* common issues of law or fact, so there would be no economies from class action treatment.

Id. at 746-47 (emphasis in original). This reasoning was fundamental to the Seventh Circuit's ruling, and is not subject to any variation in state law that Petitioners now purport exists – but which Petitioners' counsel had repeatedly averred to the district court and the Court of Appeals did *not* exist. (Pet. App. 9a-10a ("[Petitioners' counsel] had

represented to us in Thorogood's case that the laws of all 29 jurisdictions in which members of the class resided were so similar, as far as the claims in his class action suit were concerned, that 'all litigants [including all class members] are governed by the same legal rules' – 'plaintiff will need to prove the *same standards* for every jurisdiction' (emphasis in original) – 'all the class members here are covered by the same legal rule' . . . ." *quoting* Thorogood's briefing)).

Moreover, nowhere do Petitioners cite authority for the proposition that purported differences in consumer protection law in California would prevent collateral estoppel. And for good reason: this Court has already determined that the preclusive effect of a federal judgment is determined by federal law. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001); *see also Bridgestone*, 333 F.3d at 767-68 (applying *Semtek*).

Collateral estoppel, after all, prevents the relitigation of a finding essential to a previous decision. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979). Accordingly, parties cannot elude estoppel by simply pleading a different cause of action. *Taylor*, 553 U.S. at 892 ("Issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim."). Here, the essential finding of *Thorogood I* was that "there are *no* common issues of law or fact" within the meaning of Rule 23. 547 F.3d at 747 (emphasis in original). This finding is not subject to or qualified by any differences in state consumer protection law that

Petitioners now allege exist. Thus, that Murray sought to bring his copy-cat claims under California law is irrelevant to preclusion and therefore also to the issuance of an injunction based thereupon.

The Seventh Circuit's order was therefore both legally proper and in accord with the rulings of this Court and the other circuits.

C. There Is No Requirement for a Party to Seek Mandamus from Another Court Before Obtaining Injunctive Relief From a Court to Effectuate and Protect Its Prior Rulings.

Finally, Petitioners argue that the Seventh Circuit should not have ordered injunctive relief under the Act because Sears could have sought mandamus relief from the Ninth Circuit as to the *Murray* court's denial of collateral estoppel. Not only is there no circuit split on this issue, but, in fact, Petitioners' argument is made up out of whole cloth. *No* court has ruled that parties must unsuccessfully pursue an alternative course of action – much less pursue the extraordinary writ of mandamus in another forum – before asking a court to effectuate or protect its own rulings. Petitioners do not point to any ruling that would have required Sears to seek mandamus from the Ninth Circuit before pursuing injunctive relief under the Act to enforce *Thorogood I*.

Indeed, in addition to the power conferred by the Act, federal courts have "both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004); *see also In re Martin-Trigona*, 763 F.2d 140,

141 (2d Cir. 1985) (same). The authority to enjoin under the Act "is a codification of the federal courts' traditional, inherent power to protect the jurisdiction they already have, derived from some other source" – derived, in this case, from the jurisdiction originally exercised over the *Thorogood* class and the courts' rulings thereon. *Klay*, 376 F.3d at 1099.

Such power and responsibility is hardly subject to an illusory requirement that a party must first seek mandamus from another court. The Seventh Circuit has perhaps put it best:

> the All Writs Act permits courts to issue injunctive relief to protect and effectuate their *own* judgments, so that winning parties will *not* be forced to litigate a defense of collateral estoppel (or seek mandamus orders) in every subsequent forum in which they are harassed with the same legal claim until they cry "Uncle!"

(Pet. App. 42a (emphases in original)). In their final attempt to present a certworthy issue, Petitioners shoot wide of the mark.

* * *

In ordering injunctive relief, the Seventh Circuit acted well within the bounds of the Act and consonant with the precedents of this Court and the others circuits. This issue does not warrant a grant of *certiorari*, no matter how the Petitioners attempt to frame it.

CONCLUSION

Petitioners have failed to present any issues worthy of this Court's review. Instead, after years of sharp tactics and litigation abuse and being finally faced with an injunction imposed to end that abuse, Petitioners' counsel asks this Court to review an interlocutory order for an injunction that the Seventh Circuit has expressly directed be subject to changes, if any, necessitated by this Court's forthcoming decision in *Smith*. As such, the Petitioners fail to provide a vehicle in any way appropriate for this Court's review.

Accordingly, the Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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